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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 741

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner*,

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES and L. L. WOOTEN, E. C. BRYAN, B. B. PHILLIPS, JR., T. C. MATHIS, P. C. SARRETT and H. W. HAWKINS, in behalf of themselves and certain other persons similarly situated, members of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and members of the craft or class of clerical, office, station and storehouse employees of Atlantic Coast Line Railroad, *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlantic Coast Line Railroad Company respectfully prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 6, 1953, which reversed the judgment of the District Court of the United States for the Eastern District of North Carolina, at Raleigh, and directed the

issuance of a mandatory injunction against the petitioner under the Railway Labor Act. (45 USCA Sec. 152)

OPINIONS BELOW

The opinion of the District Court for the Eastern District of North Carolina is not yet officially reported but is set forth in full in the record at pages 228-245. The opinion of the Court of Appeals for the Fourth Circuit is reported at 201 F. 2d 36, a copy thereof is set forth in the record at pages 249-257.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1953. (R. 257) An order of the Court of Appeals was entered on February 23, 1953, denying a timely petition for rehearing filed by petitioner herein on February 2, 1953. The jurisdiction of this Court is invoked under Section 1254(1) and 2101 of Title 28, United States Code.

QUESTIONS PRESENTED

1. Whether a carrier, under the requirements of the Railway Labor Act, can be compelled by mandatory injunction to make a counter offer in response to an employee proposal, or otherwise to do more than consider, confer, discuss and decline the proposal, in order to avoid being found guilty and punished for a contemptuous refusal to bargain collectively.

2. Whether the Circuit Court of Appeals has any authority to order the District Court to issue a mandatory injunction in view of:

(a) the declared and established purposes of the Railway Act;

(b) the well settled rule that equity jurisdiction will not be exercised to supervise or control the making of a voluntary agreement;

(c) the express prohibitions of the Norris-LaGuardia Act.

3. Whether a carrier who refuses to include one group of employees, with special duties and responsibilities, within an agreement covering an entire craft or class of employees, can properly be held guilty of a refusal to bargain collectively in regard to such employees and can be legally compelled by mandatory injunction to subject such employees to the terms of an agreement which the carrier regards as improper or undesirable to be applied to such employees.

4. Whether mere assertions in an opinion of the Circuit Court of Appeals, which are in conflict with the findings of the District Court and with the uncontradicted evidence in the Record, can be construed as the specific findings of fact required by the Norris-LaGuardia Act as the basis for issuance of an injunction.

5. Whether a complainant labor organization which has failed to make any modification of its original, and rejected, proposal, has complied with the requirement of the Norris-LaGuardia Act to "make every reasonable effort to settle" the dispute which it has itself created.

STATUTES INVOLVED

The pertinent provisions of the Railway Labor Act (45 USCA 152) are as follows:

"Section 2:

"First. It shall be the duty of all carriers, their officers, agents, and employees to *exert every reasonable effort to make* and maintain *agreements* concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance

with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. *Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.* * * *" (Emphasis added)

The pertinent provisions of the Norris-LaGuardia Act (47 Stat. 70 29 USC 109) are:

"Section 1. That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; * * *

* * * * *

"Sec. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, * * *

"(b) That substantial and irreparable injury to complainant's property will follow:

* * * * *

"Sec. 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has

failed to make every reasonable effort to settle such dispute * * *

"Sec. 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order of injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein. * * *"

STATEMENT

The petitioner, Atlantic Coast Line Railroad Company (hereinafter called the "carrier"), has several thousand employees in a craft or class, who are represented by the respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter called the "brotherhood") which is the certified collective bargaining representative of the entire class.

For many years the carrier and the brotherhood have maintained collective bargaining agreements covering the rates of pay, rules, and working conditions of a large portion of these employees. But, about 850 out of our 5,000 employees have not been included in the terms of the agreements because the carrier regarded it as unwise or improper to include them on the grounds, *inter alia*, that they should not be subject to the rules generally applicable to the class, particularly because most of them were closely associated with management and many performed highly specialized and confidential work for the officials of the carrier.

The first of the general "clerical" agreements was negotiated on March 1, *1922*, and similar agreements with amendments and modifications have continued between the

brotherhood and the carrier to the present time. The agreement in effect at the time of the filing of this action was executed on February 16, 1944.

In December, 1937, the brotherhood first requested the carrier to amend the general agreement so as to bring the excepted group of employees within its rules. Such a proprosal by the brotherhood has been repeatedly under discussion and negotiation since that time. As a result of a notice served on November 2, 1943, by the brotherhood, extensive negotiations were held concerning the proposal to include *all* the excepted positions within the general agreement, but no agreement upon this proposal was reached.

The brotherhood, in an election held under the Railway Labor Act, was chosen and certified in 1947 as the bargaining representative of the entire craft or class of clerical employees, specifically including the employees occupying excepted positions. At the time of the election there were approximately 5,600 employees permitted to vote. Of this number, approximately 850 were employees in those positions excluded from the rules of the agreement.

On January 13, 1948, the brotherhood again submitted a proposal to the carrier under the terms of which all employees then excluded from the provisions of the existing agreement would become subject to at least *some* of its rules.

Extensive conferences were held between the carrier and the brotherhood in connection with this proposal on February 19, 20, 24, 26, 27 and April 2, 1948. No agreement was reached as a result of these conferences during which the brotherhood refused to alter or amend its proposal that *all* the excepted positions must be included in the agreement under *one* or *more* of the proposed rules.

The brotherhood invoked the services of the National Mediation Board, which assigned a mediator, but after a number of conferences no settlement could be reached and the statutory proffer of arbitration was declined by the carrier.

The brotherhood thereupon instituted an action in the District Court of the United States for the Eastern District of North Carolina at Raleigh, seeking a mandatory injunction against the carrier, on the ground that the carrier had failed and refused to bargain with the brotherhood in accordance with the provisions of the Railway Labor Act. A trial was held before the Court, during which numerous witnesses testified and other evidence was submitted.

The principal basis of the brotherhood's complaint was that the carrier refused to make a counter-proposal which would include all of the excepted positions under one or more of the proposed rules and that this constituted a refusal to bargain with the brotherhood in regard to said positions.

The District Court held that the brotherhood had *not* "met the burden of showing by clear and convincing evidence that the carrier had failed to meet the requirements of collective bargaining", and that it was the judgment of the Court "that the injunctive relief which is sought should not issue."

The findings made by the trial court included the following:

> "The clear and uncontradicted facts in this case are that the brotherhood submitted but one proposal which, upon being rejected by the carrier, they declined to modify." (R. 241)
>
> "The carrier recognizes the brotherhood as the collective bargaining representative, but declines merely to adopt the proposal suggested because it appears inadvisable to the carrier to do so, having reference only to the manner of conducting its own affairs. The Court believes there is merit in this position." (R. 241)
>
> "In the instant case the main reason for the rejection of the Brotherhood's proposal was the alleged fact that many of the excepted positions were positions of trust, the holders of which were often possessed of confidential employer information. While the fact of confidential relationship does not, of itself, preclude

> those in such positions from being properly included in the scope of collective bargaining, * * * such a reason for the rejection of the proposal does appear to be well-founded * * *." (R. 244)

The Brotherhood thereupon appealed the judgment of the District Court to the Court of Appeals for the Fourth Circuit, which reversed the judgment of the District Court and directed that a mandatory injunction be issued, as requested by the brotherhood.

The Court of Appeals based its decision upon a conclusion that negotiations and conferences of February 19, 20, 24, 26, 27 and April 2, 1948, between the carrier and the brotherhood did not constitute "bargaining in good faith on the part of the carrier, but on the contrary, constituted a refusal on its part to engage in collective bargaining.

In accordance with the mandate of the Circuit Court, the District Court will now be required to issue a mandatory injunction requiring the carrier to carry on negotiations in a manner which will satisfy the court's definition of "collective bargaining." This, according to the Circuit Court opinion, apparently means that the carrier must make counter proposals or offer concessions to the brotherhood which will be approved by the Court as a "reasonable effort to make an agreement." This means that the District Court would have to assume the functions of a compulsory arbitrator of a labor dispute, which was never contemplated by the Railway Labor Act and would be in direct conflict with its purposes as repeatedly defined by the Supreme Court.

This case presents the novel proposition that if, in negotiations between representatives of a carrier and of its employees, either party takes the position of refusing to accept a proposal by the other and makes no counter proposal, the moving party can apply to a court for a mandatory injunction, under which the court will command the resisting party to make some counter proposal (presumably of a reasonable nature) or else to be held in contempt of court.

Such a construction of the law, if judicially established, would actually make an end of "collective bargaining" and involve the courts in an interminable process of supervising and regulating trade agreement negotiations.

It might be assumed that the Circuit Court did not *intend* to establish such a construction of the Railway Labor Act. But its opinion and judgment will compel the District Court in the present case to enforce such a construction of the Act; and, if the Circuit Court opinion stands uncorrected, it will provide a precedent encouraging the filing of a host of lawsuits in which unsuccessful negotiators will seek mandatory injunctions to compel concessions by opposing parties. Therefore it is a matter of vital consequence, in the exercise of the Supreme Court's power of supervision, for this Court to examine the basis for the extraordinary ruling of the Circuit Court. Then it will become evident that the Circuit Court, through a misunderstanding of the facts, has been led to a conclusion of law which, on the basis of the actual facts of the case, is unprecedented and insupportable.

SPECIFICATION OF ERRORS

The United States Court of Appeals for the Fourth Circuit erred:

(1) In directing the issuance of a mandatory injunction under the Railway Labor Act compelling the carrier to make a counter offer in response to an employee proposal, or otherwise to do more than consider, confer, discuss and decline the proposal;

(2) In directing the issuance of a mandatory injunction of a nature that is contrary to the declared and established purposes of the Railway Labor Act, the well-settled rules of equity jurisdiction and the express prohibitions of the Norris-LaGuardia Act;

(3) In holding that a carrier, which refused to include a limited group of employees, with special duties and responsibilities within an agreement covering an entire craft or class, is guilty under the Railway

Labor Act of refusing to bargain collectively with respect to such employees, and that the carrier can legally be compelled by mandatory injunction to subject such employees to the terms of the agreement, even though the carrier regards it as improper or undesirable to do so;

(4) In reversing the judgment of the District Court and directing the issuance of a mandatory injunction upon mere assertions, which are in conflict with the specific findings of the District Court and with uncontradicted evidence in the Record, and without making specific findings of fact required by the Norris-LaGuardia Act as the basis for the issuance of such injunction;

(5) In granting injunctive relief to a complainant labor organization which has failed to make any modifications of its original and rejected proposal, in violation of the requirements of the Norris-LaGuardia Act to "make every reasonable effort to settle" the labor dispute which in this case it has itself created.

REASONS FOR GRANTING THE WRIT

The numerous errors of fact in the opinion of the Circuit Court (which are in conflict with the findings of the District Court) point clearly to the basis for the grave error of law in the judgment entered. Through one such an error of fact the Circuit Court arrived at the unwarranted conclusion that the railroad had "refused" to bargain collectively. The position of the railroad was mis-stated by the Court repeatedly in the following language:

> "The position of the railroad was and is that the positions held by the excepted employees are of such a character that the collective bargaining process cannot properly be applied to them but that their rates of pay, rules and working conditions should be determined, not by collective bargaining, but by unilateral action on the part of the railroad." (R. 250)

Again (from the Circuit Court opinion):

> "But it is perfectly clear from the evidence that the railroad was making no effort whatever to bargain with respect to the rates of pay, rules and working conditions applicable to these employees, as required by statute, but on the contrary was adhering to the position theretofore taken that collective bargaining was not applicable to them." (R. 254)

The Circuit Court adhered to the foregoing mis-statements notwithstanding the explicit statement of the carrier in the petition for re-hearing as follows:

> "The carrier has never taken the position that the excepted employees were not proper subjects of collective bargaining and the Record does not justify such a conclusion." (Petition for Rehearing, p. 10, R. 269)

In support of its assertion the carrier cited in its Petition and now again cites the finding of the trial court which reads as follows:

> "Therefore it does not appear to the court that the brotherhood can successfully create a representation dispute out of this controversy. On the contrary it appears that the carrier's position with respect to this point is well founded, i.e., that the carrier recognizes the brotherhood as the collective bargaining representative, but declines merely to adopt the proposal suggested because it appears inadvisable to the carrier to do so, having reference only to the manner of conducting its own affairs. The court believes that there is merit in this position." (R. 240-1)

The Record is quite clear that the carrier engaged in extensive discussions with the brotherhood as the representative of all the employees and in these negotiations the carrier's representative, when accused by the union representatives of declining to bargain collectively with the

brotherhood as representative of all the craft, explicitly said:

> "My answer was that the company did not decline or refuse to enter into the processes of collective bargaining for the employees represented by the clerks' organization, but that we did decline and still decline to agree to the changes in the current agreement effective February 16, 1944, which were proposed in their notice of January 13, 1948." (R. 170)

The facts, as found by the District Court, were that the carrier engaged in extensive collective bargaining with the *brotherhood* as the representative of *all* the employees including the excepted employees. (R. 243) The carrier did *not* refuse to bargain but, as the trial court found, merely "declined" to adopt the proposal suggested. The proposal to cover all the excepted employees within the scope rule of the agreement was objectionable for reasons made evident to the brotherhood in many conferences prior to those which led to the present suit. The brotherhood knew in advance of its proposal that any such blanket coverage of confidential employees and those in specialized employment would be objectionable. Nevertheless, in its letter proposing a revision of the rules, the brotherhood's general chairman, *who had participated in years of previous* negotiations, said bluntly:

> "It will be observed from this proposal that we are seeking to bring within and under the scope and operation of our current agreement governing hours of service and working conditions, employees of the craft or class of clerical, office, station and storehouse employees covered by National Mediation Board certification in Case R-1808, dated October 30, 1947, which are not now covered by said agreement." (R-42)

The proposal of the brotherhood offered to except *some* of the previously excepted employees from *some* of the rules. It was clearly evident to the brotherhood, when the

carrier declined to agree, that the blanket coverage of *all* previously excepted employees and the limited exception of *some* employees from *some* of the rules were not acceptable to the carrier *for reasons which had been discussed for years and were quite obvious to representatives of both parties.*

It is a fact that the carrier made no counted proposal. But it certainly cannot be established as a rule of law that failure to make a counter proposal, or to accept part of a proposal, is a refusal to engage in collective bargaining! Indeed, if anyone refused to bargain collectively in the present case it might better be charged that the brotherhood refused. It was an uncontradicted fact as found by the trial court that "the brotherhood submitted one and only one set of proposals, and did not see fit to modify these proposals in any fashion." (R. 236)

If the moving party to a negotiation can call it "collective bargaining" to submit a demand and then after its rejection, fail or refuse to modify it, certainly it must be equally good "collective bargaining" for the opposing party simply to refuse to accede to the demand. Surely collective bargaining does not mean that whenever one party makes a proposal the other party must make a counter proposal or a concession, or be found guilty of refusing to bargain. Yet that is the exact and only possible conclusion of law which emerges from the Circuit Court opinion in the light of the facts of the present case.

There is no way in which the District Court could enforce a mandatory injunction "in accordance with this opinion" (the opinion of the Circuit Court) except by commanding the carrier to make some concession or counter proposal or else accept the brotherhood's proposal. Yet the Circuit Court opinion includes the following:

> "We do not of course suggest the terms of any agreement as to any employee or group of employees; for *it is not the function of the courts to make agreements for the parties or to force them to accept agree-*

> *ments which they are unwilling to accept.* What we do and all that we do is direct that the railroad bargain collectively and in good faith with the brotherhood with respect to the pay, rules and conditions of work of these 850 employees as required by the terms of the Railway Labor Act." (Italics ours)

Yet, apparently, from previous statements in the court's opinion there is a refusal to engage in collective bargaining when a carrier declines an employee proposal "without making any counter offer or indicating any basis upon which he is willing to bargain." (R. 254)

To give the foregoing words some meaning as the statement of a legal principle they must be held to mean that an employer who is confronted with any contractual proposal by employees must either make a counter offer or indicate in some way that some different proposal might be acceptable to him. To establish such a principle and to put the enforcement of it in the courts through the power of mandatory injunctions would simply destroy the foundation principle of voluntary agreement which it is the purpose of the Railway Labor Act and other similar legislation to sustain. If every dissatisfied negotiator can go to court and have the court insist that the other party make concessions or counter proposals, the entire nature of collective bargaining is changed from a free negotiation to a coerced negotiation under the supervision and control of government officers—the judiciary. This would be far more tyrannical than an out and out compulsory arbitration because the judges would not even accept responsibility for the ultimate agreement but merely assume authority to coerce one or the other party into making an agreement.

Let us put the shoe on the other foot for a moment and suppose that a carrier, confronted with declining revenues, proposed a wage reduction to the employees. Then, under this projected rule of law, the employees would be compelled to make a counter proposal or else to indicate some other basis upon which they were willing to bargain.

The simple fact is that there can be no real "collective bargaining" conducted under the coercion of mandatory injunctions. The only cases which provide any basis for the present lawsuit are cases where a carrier or some other employer has refused to *recognize* the designated representatives of its employees. In such cases it is clear that the employer has refused to "treat with" the employees, or to "bargain" with them, but where, as here, the employer acknowledges the authority of the representatives and spends hours in conferences with them, carefully considering their proposals, the idea that, when those proposals are rejected the employee representatives can claim there has been a refusal to bargain collectively is fantastic as an assertion of fact and insupportable as a conclusion of law.

We have endeavored up to this point to demonstrate that the opinion and judgment of the Circuit Court should not be permitted to remain uncorrected, because this would apparently establish as the law that collective bargaining under the Railway Labor Act can be and should be supervised and regulated by mandatory injunctions issued by the Federal Courts, designed to make the negotiations conform to judicial determinations of what is "collective bargaining in good faith." Nothing could be more destructive of the purposes of the Railway Labor Act than to establish such a rule of law. There is no basis in the Act itself for such an assumption of judicial authority.

The sole basis for judicial intervention lies in the doctrine of the Virginian case, *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U.S. 515 which has been gradually extended until, in the present case, it produces a growth as vicious as poison ivy climbing on a honeysuckle vine. The Supreme Court vigorously and wisely held in the Virginian case that the Federal Courts could enforce by mandatory injunction the requirement of the Railway Labor Act that a carrier must "treat with" the duly authorized and certified representative of its employees. To make this

command more than an idle gesture it was necessary for the courts to hold thereafter that there must be more than a perfunctory "recognition" of employee representatives. The carrier must negotiate in good faith, i.e., discuss proposals freely and in such a manner as to make it clear that a "reasonable effort to make an agreement" was being made.

But, here the courts enter on a most dangerous and delicate field of inquiry. Even in the present case the Circuit Court conceded it was "not the function of the courts to make agreements for the parties *or to force them to accept agreements which they are unwilling to accept.*" (Italics ours) If, however, a court, as in the present case, ignores what a carrier's representatives *said,* and ignores what they *did* in holding many long conferences over a proposal, and finds lack of "good faith" simply in a refusal to agree and a failure to make any counter proposal—then the court's mandatory injunction becomes a coercion to make an agreement.

There is no question that the Federal Courts should not and would not undertake the responsibility of endeavoring to compel parties to a railway labor dispute to make an agreement. Nor should they undertake such a supervision of the conduct of the parties in negotiations as would amount to compelling them to make proposals and counter proposals and concessions to each other. Such judicial supervision would not only be destructive of the purposes of the Railway Labor Act, but would violate the well settled rule that equity jurisdiction will not be exercised to involve the courts in a continuing supervision and control of the conduct of the management of private business, particularly in the negotiation of contracts. As this Court stated in the *Virginian* Railway case, supra,

> "It is true that a court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff. Equity will not decree the execution of a partnership

agreement since it cannot compel the parties to remain partners, see *Hyer* v. *Richmond Traction Co.*, 168 U.S. 471, 482, or compel one to enter into performance of a contract of personal service which it cannot adequately control, *Marble Company* v. *Ripley*, 10 Wall. 339, 358; *Karrick* v. *Hannaman*, 168 U.S. 328, 336; *Tobey* v. *Bristol*, Fed. Cas. No. 14,065; *Weeks* v. *Pratt*, 43 F. (2d) 53, 57; *Railway Labor Act*, § 2, Tenth." (P. 550-551)

In the present case there is a further reason for the impropriety, and indeed lack of legal authority, in the issuance of such a mandatory injunction by the District Court as is apparently required to comply with the opinion of the Circuit Court.

The Norris-LaGuardia Act does not prohibit all injunctions in labor disputes, although sometimes mistakenly so construed. But the Act does impose definite limitations upon the powers of the Federal Courts in the issuance of injunctions in labor disputes. It is conceded that, under the doctrine enunciated in the Virginian case, supra, the District Court could issue a mandatory injunction requiring a recalcitrant carrier to recognize and "treat with" a labor organization which had been duly authorized to represent its employees. But such an injunction, under the requirements of the Norris-LaGuardia Act, must, in the language of the Virginian case, be confined to "the particular acts complained of and found by the court."

The Act itself limits the injunction to including—

> "Only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such a case and as shall be expressly included in said findings of fact made and filed by the court as provided herein . . ." (29 U.S.C. 109)

In the present case there is no question but that the representatives of the carrier met with representatives of the employees on several occasions. They received and carefully considered the employees' proposal and then

declined to accept it. They did not deny the right of the brotherhood to represent all the employees covered by the proposed revised agreement. If the carrier is now ordered to renew conferences and discussions with the brotherhood its officers have no guidance (and the District Court has no guidance) from the opinion of the Circuit Court as to what particular acts, these carriers' representatives have failed to perform. There are no findings by the Circuit Court in this regard; only some clearly erroneous assertions in its opinion.

The brotherhood complained of the action of the carrier's representatives on the grounds stated in their brief, as follows:

> "The carrier was under obligation to discuss with the brotherhood the substantive merits of the brotherhood's proposal, namely, each one of the eighty-one rules involved, and, if it objected, to state the reasons for its objection to each rule or at least to each group of rules relating to a particular subject matter. Furthermore, it was under obligation to state such reasons with respect to each employee or group of employees involved, for the proposal requested that different rules be applied to different employees and groups of employees." (Appellant's brief in Circuit Court, p. 13)

It is conceded that the representatives of the carrier did not make any such detailed analysis and discussion of the employees' proposal in the 1948 conferences. But it is also a fact, as found by the District Court, that the carrier had "over a period of some 26 years engaged in voluntary negotiations with the same union, out of which have come at least four contracts; and in each of those contracts there has been carried forward a clause excluding certain persons and in at least the most recent contract (four years previous) the reasons for excluding the certain persons were fully discussed and made known to the representative of the employees,, and that same representative is mindful of those reasons at the time he commences negotiations in a current proposal to include those persons

formerly excluded; and in the current negotiations the employer hears the oft repeated proposal, and asks questions to clarify whatever doubts he may have concerning the latest version and thereupon again rejects the proposal, either with or without repeating his reasons which were fully voiced in the next preceding negotiations." (R. 243)

Following the foregoing observations the District Court, continued and concluded:

> "And where the employer declines to submit a counter proposal and the representative of the employees does not modify his request in any manner in the form of a revised proposal and where conditions are not shown to have changed, it would appear that the employer, here the carrier, has done all that is required in the nature of collective bargaining."

The Circuit Court made no finding directly in conflict with the foregoing specific findings of the District Court. If a mandatory injunction is to be issued there should be (under the Norris-LaGuardia Act and in conformity with the opinion of the Supreme Court in the Virginian case) a finding by the District Court pointing out what additional acts should be performed by the carrier to fulfill the requirements of collective bargaining as determined by the Circuit Court.

See also, *J. I. Case Co.* v. *Labor Board,* 231 U.S. 332, 341.

If the Circuit Court is of the opinion that to constitute "collective bargaining," it was necessary for the carrier representative to restate all the objections to the employee proposal which had been explained to the same representative of the employees in previous conferences, the Circuit Court should have made clear findings to that effect. Then if a mandatory injunction were issued the carrier could comply with it to the full satisfaction of the court. If the Circuit Court intended to approve the complaint of the brotherhood and to hold that the carrier should have explained its reasons for objecting to each rule and to its application to each employee, the Circuit Court should have

so found and then the carrier could comply with any mandatory injunction so ordered.

But, we must assume that the Circuit Court could hardly disagree with the expressed opinion of the District Court that "collective bargaining in good faith" does not impose on a negotiator any such meticulous discussion of each and every detail of a lengthy proposal, particularly when the fundamental objection of a carrier to the proposal as a whole, and the reasons therefore, have been made amply plain to the employee representative. Thus we are forced to assume that the Circuit Court opinion was based on a misunderstanding of the facts and on an unwarranted acceptance of the charge of employee representatives that the carrier representative had refused to "treat with" the brotherhood as the representative of all the excepted employees, had refused to discuss the employee proposal, and had peremptorily declined it; and had thus failed to engage in collective bargaining in good faith.

Unhappily, however, the Circuit Court's misunderstanding of the facts is obscured by statements such as previously quoted wherein the Circuit Court mis-stated the position of the carrier, disregarded the extensive collective bargaining of the carrier with the *same* representative of the *same* employees, and then ordered a mandatory injunction to issue to compel collective bargaining without any findings of fact upon which such an intelligible mandatory injunction could properly be based.

It might not be necessary to seek this review and correction of the opinion of the Circuit Court if the effect of the opinion could be confined to a mere holding that the carrier should have discussed the employee proposal in greater detail and explained its reasons for its rejection more fully. But there is a vice in the opinion of the Circuit Court which may have far-reaching consequences if the opinion stands uncorrected. That vice is made evident in one sentence in the opinion reading is follows:

> "An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not

> meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it *without making any counter offer or indicating any basis upon which he is willing to bargain.*" (Italics ours.)

The italicized statement of the court apparently instructs the District Court that, in issuing and enforcing the mandatory injunction, the carrier should be required to make a counter offer or to indicate a basis upon which he is willing to bargain. This must mean that a carrier is denied the right of simply refusing to accept an employee proposal; but some counter offer or concession in partial satisfaction of the demand.

We submit that any such doctrine is absolutely destructive of the liberty of contract of a carrier who is confronted with an employee demand which is to him in whole or in part not acceptable. What liberty of contract is permitted to a carrier if, whenever an employee demand is made upon him, he *must* make some kind of a counter offer or concession in order not to be found guilty of refusing to bargain in good faith?

What liberty of contract would remain with a union if, every time an employer requested a change in the trade agreement, it would be necessary for the union to make some counter offer or concession advantageous to the employer?

If the apparent doctrine of the Circuit Court's opinion were to prevail it is obvious that the courts would be swamped with suits for mandatory injunctions under which the courts would be called upon to supervise a multitude of labor negotiations and to compel any party who simply rejects a demand to make concessions of some sort to the other party, or else be held in contempt of court for refusing to bargain collectively.

One other vice in the Circuit Court opinion requires brief consideration. The court repeatedly criticizes the carrier for its alleged purpose to have the pay, rules and

working conditions of the excepted employees determined "not by collective bargaining but by unilateral action on the part of the railroad." (R. 251) However, against the demand of the brotherhood that *all* clerical employees should be covered in one agreement the carrier's position was *not* that *all* these employees should be left out of any trade agreement.

The brotherhood never proposed a separate trade agreement to cover these specialized employees. The carrier never took the position that *all* these employees should be subject only to individual contracts. But, to the extent that the carrier might take the position that some of the excepted employees should be left out of any general agreement and subject only to individual contracts, the carrier would be fully within its rights under the law and common practice under the Railway Labor Act. Many confidential employees are customarily excluded from bargaining units under both the National Labor Relations Act and the Railway Labor Act.

In *N.L.R.B.* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, the opinion of the Supreme Court pointed out that the Railway Labor Act should *not* be construed "as precluding such individual contracts as the Company might elect to make with individual employees;" and that the National Labor Relations Act "does not prevent the employer from refusing to make a collective contract and hiring individuals on whatever terms the employer may by unilateral action determine." (301 U.S. 1, 45)

To the same effect are the opinions of this Court in the *Virginian case, supra* (300 U.S. 515) and in *Order of Railroad Telegraphers* v. *Railway Express Agency,* 321 U.S. 342.

Yet, in the face of this well-settled construction of the statutes by the Supreme Court, the opinion of the Circuit Court holds that there is a refusal to bargain in good faith because the carrier in the present case insisted that some of the clerical employees should not be included within the

general trade agreement, but that their wages, rules and working conditions should be fixed either by a special trade agreement or by individual agreements—which are inaccurately and prejudicially described as "unilateral action on the part of the railroad." (We submit that when a railroad employs a president or a confidential secretary, the employee may not have the benefit (or detriment) of "collective" action in behalf of a large number of employees, but the employment must be based on an agreement about wages and conditions of employment, which requires bilateral—not unilateral—action.)

The right of minorities and individuals in a craft or class to separate treatment, because of specialized employments, is one commonly ignored by labor organizations; but it should not have been ignored by the Circuit Court. That right is made clear in recent opinions of the Supreme Court holding that the Railway Labor Act imposes "on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192.

In its one-sided criticism of the carrier in the present case the Circuit Court ignored entirely the obligation of the brotherhood to employees who were non-members or who had employments requiring separate treatment—the obligation not to force those employees under the terms of a general agreement which should not be applied to them and which, as shown in the present case, a large number of these employees did not wish to have applied to them. (R. 135, 136, 145-150)

The real failure of collective bargaining in the present case is traceable not to the intransigence of the carrier but to the intransigence of the brotherhood which persisted in seeking to write into a contract provisions which, after years of previous negotiations, the brotherhood was well aware would not be acceptable to the railroad and not

desirable for, or desired by, the segment of employees who would be particularly affected. It would be a tragic mis-use of the powers of the Federal Courts to employ a mandatory injunction to support the efforts of a labor organization to force upon a carrier an agreement neither acceptable to the carrier nor desirable nor acceptable to the employees thus misrepresented. The Norris-LaGuardia Act also provides that a complainant shall not be entitled to an injunction if he "has failed to make every reasonable effort to settle the dispute"— (Sec. 8). See *Bro. of Railway Trainmen et al.* v. *Toledo, P. & W. R.R.*, 312 U.S. 50.

Because of the importance of the questions here presented (1) to a proper construction of the Railway Labor Act, and (2) to a proper and legal use of the injunctive powers of the Federal Courts, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 741

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND L. L. WOOTEN, E. C. BRYAN, B. B. PHILLIPS, JR., T. C. MATHIS, P. C. SARRETT AND H. W. HAWKINS, IN BEHALF OF THEMSELVES AND CERTAIN OTHER PERSONS SIMILARLY SITUATED, MEMBERS OF BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND MEMBERS OF THE CRAFT OR CLASS OF CLERICAL, OFFICE, STATION AND STOREHOUSE EMPLOYEES OF ATLANTIC COAST LINE RAILROAD, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Dated: June 3, 1953.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (R. 249-257) is reported at 201 F. 2d 36. The opinion of the District Court (R. 228-245) is not officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth by petitioner.

QUESTIONS PRESENTED

As will be more fully developed in our statement and argument of what this case actually involves, petitioner's real complaint is that the Circuit Court did not agree with its evaluation of the evidence of record. Its position that grave errors of law were committed rests first on an erroneous re-evaluation of the facts according to petitioner's conception of what they prove, and second on a misconstruction of the Circuit Court's opinion. The result is a number of simulated issues predicated on hypothetical facts. Certainly no one who had anything to do with the trial of this case or its presentation to the Circuit Court would recognize the issues as stated by petitioner. Even a casual reading of Judge Parker's opinion will disclose this. The conclusion is unavoidable that only by such re-evaluation of the evidence contrary to the conclusions reached by the Circuit Court and misconstruction of the court's opinion can petitioner hope to state a case for certiorari where none in fact exists. Rather than burden this section of the brief with a detailed discussion of why petitioner's questions presented are specious, we believe our own statement of the problem actually before the Court on this petition is compatible with the record, will square with well-established principles of this Court governing the exercise of its certiorari jurisdiction, and will properly acquaint the Court with the real questions presented for determination.

We think the questions presented on this petition for certiorari are as follows:

1. Whether this Court should undertake to review the unanimous factual determination of the Circuit Court that it is "perfectly clear from this record that the railroad [petitioner] has not engaged in good faith bargaining with respect to pay, rules and conditions of work of these 850 employees as contemplated by the Railway Labor Act . . .".

2. Whether the Circuit Court's further conclusion that as a consequence of the foregoing the injunctive power of the court should be exercised to require petitioner to bargain in good faith, and its subsequent denial of a petition for rehearing seeking detailed specification of "acts or actions required or forbidden" by the mandatory injunction to be issued, constitute such an improvident exercise of discretion or represent such a departure from established principles of law as to warrant review and correction by this Court.

STATUTE INVOLVED

The pertinent provisions of the Railway Labor Act, as amended, are adequately set forth in the Petition (pp. 3-4). We do not agree with petitioner that provisions of the Norris-LaGuardia Act are involved, and will later show that it is well established by decisions of this Court that the injunction here ordered by the Circuit Court is not forbidden by the Norris-LaGuardia Act.

STATEMENT

This is a case where the decision of the Circuit Court was resolved solely upon an analysis of the particular facts involved. There is no conflict here with the decision of any other circuit court. There is no important

question of federal law involved which has not been settled by this Court. There is no decision of a federal question so as to conflict with applicable decisions of this Court. In short, there is no recognized basis upon which certiorari properly could be granted.

It will be our purpose to first briefly summarize the history of this controversy, and then to demonstrate in our argument that since the problem is entirely factual it does not warrant review by this Court.

The respondent Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter called the "Brotherhood") has for many years maintained collective bargaining agreements with petitioner Atlantic Coast Line Railroad Company (hereinafter called the "carrier") covering the rates of pay and working conditions of a limited number of clerical employees of the carrier, the first of such agreements having been negotiated in 1922. Such contracts, with certain amendments and modifications, have continued in effect until the present time.

Some 850 of the clerical employees of the carrier have been entirely excluded from the provisions of the agreements and all of their conditions of employment have continued to be fixed by the unilateral action of the carrier.

About sixteen years ago, the Brotherhood requested the carrier to include the excepted clerical employees within all of the rules of the agreement, but the carrier denied such request. Again, about ten years ago, the Brotherhood made a similar request which was denied after negotiations which the Circuit Court said "did not evidence bargaining on the part of the railroad with respect to these employees

but refusal on its part to include them within the ambit of the bargaining process" (R. 254).

The foregoing negotiations occurred at times when the Brotherhood was not the certified bargaining representative of the involved clerical employees and was not recognized by the carrier as such.

In 1947, in accordance with the provisions of Section 2 (Ninth) of the Railway Labor Act, 45 U.S.C.A., Sec. 152 Ninth, the Brotherhood was certified by the National Mediation Board as the duly designated and authorized collective bargaining representative of the clerical employees of the carrier, expressly including those now entirely excluded from the coverage of the existing collective bargaining agreement (R. 3). As such certified representative, the Brotherhood submitted a new and different proposal to the carrier. Whereas its previous proposals had sought to include all employees under all rules of the agreement, the 1947 proposal gave recognition to relevant differences in the duties and responsibilities of the various employees involved by requesting that very few rules apply to a substantial number of the employees, that less than all of the rules apply to certain other employees, and that all of the rules apply only to the other employees.

Conferences were held on the proposal, and while petitioner *now* describes them as extensive they were described on page 28 of its brief in the Circuit Court as "little or no discussion", and were summarized by its chief negotiator as follows:

> "We were willing to listen to anything they had to say. They stated what they wanted, they didn't get it, and that was the end" (R. 204, 205).

The Circuit Court's unanimous view of these negotiations was:

> ". . . it is perfectly clear from the evidence that the railroad was making no effort whatever to bargain with respect to the rates of pay, rules and working conditions applicable to these employees, as required by statute, but, on the contrary, was adhering to the position theretofore taken that collective bargaining was not properly applicable to them. An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain" (R. 254).

No agreement was reached as a result of these negotiations. Nor could good faith negotiation for an agreement *begin* so long as the carrier maintained the position that "We don't want them tied down by an agreement" (R. 193).[1] Following the breakdown of negotiations the Brotherhood invoked the services of the Mediation Board in accordance with the provisions of Section 5 (First) of the Railway Labor Act (45 U.S.C.A. Sec. 155 First) requesting mediation of the dispute. Mediation under the auspices of the Board failed, and the Board proffered arbitration in accordance with the provisions of the Act. The Brotherhood accepted the proffer of arbitration but the carrier declined. The foregoing procedure having exhausted the administrative remedies provided by the Act, the Brotherhood instituted this suit.

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[1] Testimony of W. L. Dixson who was in charge of the negotiations for the carrier.

ARGUMENT

The only question presented below was whether, on the basis of all of the evidence, the carrier had bargained collectively in good faith with the Brotherhood. The Circuit Court, after making specific findings as to the conduct and the attitude of the carrier during the bargaining process, found that it was "perfectly clear from this record that the railroad has not engaged in good faith bargaining . . . as contemplated by the Railway Labor Act, and that the injunctive powers of the court should be exercised to require it to do so" (R. 257). In accordance with these findings, the Circuit Court then said:

> "What we do and all that we do is direct that the railroad bargain collectively in good faith with respect to the pay, rules, and conditions of work of these 850 employees, as required by the terms of the Railway Labor Act" (R. 257).

This Court said in *Virginian Railway Co. v. System Federation No. 40,* 300 U. S. 515, that "whether action taken or omitted is in good faith or reasonable are everyday subjects of inquiry by the courts in framing and enforcing their decisions." Thus, in this case the Circuit Court performed the common judicial function of determining whether the action taken or omitted by the carrier was in good faith and, having found that it was not, ordered the carrier to bargain in good faith.

The basic reasons advanced by petitioner for the granting of the writ are that "numerous errors of fact" were committed by the Circuit Court which assertedly lead to "grave error of law in the judgment entered" (Pet., p. 10). Most of the petition is devoted to a discussion of these alleged errors of fact, but it is clear upon analysis that they merely

demonstrate petitioner's unwillingness to accept the conclusion of the three circuit judges that it was perfectly clear from the evidence of record that petitioner had failed to bargain in good faith as required by the Railway Labor Act — the only issue which the court had before it for decision.

Petitioner's efforts to depict the alleged errors of the Circuit Court as resulting in an improper construction of the Railway Labor Act and an illegal use of the court's injunctive powers are not convincing. While we are persuaded that this will sufficiently appear from a reading of Judge Parker's opinion for the court below, we are also mindful of this Court's repeated admonition to the bar that counsel for both sides will be expected to see that a petition for certiorari and reply will disclose the real situation so that the rights of interested parties will not be unfairly prejudiced and the Court will not be impeded in its efforts properly to dispose of causes which constantly crowd its docket. *Furness, Withy & Co. v. Yang-Tsze Ins. Asso.*, 242 U. S. 430, 433-434; *Southern Power Co. v. North Carolina Public Serv. Co.*, 263 U. S. 508, 509.

With this in mind, we conceive it to be our responsibility to show wherein petitioner's misinterpretation or misconception of what the Circuit Court said and ordered lead to the wholly unwarranted position, which petitioner takes, that Judge Parker's opinion is destructive of free collective bargaining under the Railway Labor Act and compels judicial supervision of bargaining agreements through the issuance of mandatory injunctions.

I.

The Circuit Court's Decision that Petitioner Failed to Bargain in Good Faith was Predicated on an Evaluation of Particular Facts, and Petitioner's Position that this Evaluation was Erroneous does not Present a Proper Case for Certiorari.

Essentially, petitioner's entire argument is a quarrel with the Circuit Court's evaluation of the evidence of record. The petition abounds with such statements as "the Circuit Court's misunderstanding of the facts", its "numerous errors of fact", and its alleged ignoring of "what a carrier's representatives *said*" and "what they *did*". Fundamentally, therefore, petitioner's complaint is that on the facts the Circuit Court should not have found that it had failed to comply with the standards of good faith bargaining with the Brotherhood required by the Railway Labor Act.

Thus, if the writ should be granted, this Court will be called upon to review the facts and determine whether the Circuit Court properly found from the evidence that the carrier had not bargained in good faith. That this Court will not and should not do so is clear from its decision in *National Labor Relations Board v. American National Insurance Company*, 343 U. S. 395, 410, 96 L. ed. 1027, 1040:

> "We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' National Labor Relations Board v. Pittsburgh S. S. Co., 340 US 498, 503, 95 L ed 479, 482, 71 S Ct 453 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory

> standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."

It is also clear that the certiorari jurisdiction of this Court "is not, and never has been, primarily concerned with the correction of errors in lower court decisions."[2] As Chief Justice Taft said in *Magnum v. Coty*, 262 U. S. 159, 163, certiorari jurisdiction "was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

II.

The Circuit Court Did Not Make the "Novel" and "Extraordinary" Ruling Which Petitioner Contends Requires the Exercise of the Power of Supervision of This Court. Moreover, Its Decision Was Clearly Correct.

The basis of petitioner's request for the exercise of the power of supervision of this Court is an alleged finding by the Circuit Court that good faith bargaining required the carrier to make a counter-proposal or concession to the Brotherhood during the collective bargaining negotiations. It asserts that the mandate of the Circuit Court would require the District Court to issue a mandatory injunction requiring the carrier to "make counter proposals or offer concessions to the Brotherhood which will be approved by the court as a reasonable effort to make an agreement." This, the petitioner says, presents a "novel proposition" and provides a "precedent" encouraging the filing of a host of lawsuits. It is then contended that "it is a matter of vital consequence in the exercise of the Supreme Court's

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[2] Address of Mr. Chief Justice Vinson before the American Bar Association September 7, 1949.

power of supervision for this court to examine the 'extraordinary' ruling of the Circuit Court."

On page 13 of the petition, the following statement appears:

> "But it certainly cannot be established as a rule of law that failure to make a counter proposal or to accept part of a proposal is a refusal to engage in collective bargaining!"

The next three pages of the petition are devoted to an argument that the Railway Labor Act does not and should not require a carrier to make a counter proposal or concession and a discussion of the alleged evils which would flow from such a legal requirement.

The short answer to petitioner's argument is that there was no contention made by any party before the Circuit Court that the carrier was required to make a counter proposal to establish its good faith, nor did the Circuit Court so hold.

The only reference to a counter proposal contained in the opinion of the Circuit Court is the following statement:

> "An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain."

This statement of the Circuit Court followed specific findings as to what conduct of the carrier constituted an intransigent attitude. It is perfectly clear that the Circuit Court did not hold that the making of a counter proposal

or concession was a requisite of good faith bargaining, but held rather, in view of the particular facts of this particular case,[3] that its failure to do so, plus its otherwise intransigent attitude and failure to indicate *any* basis upon which it was willing to bargain, clearly demonstrated a lack of good faith. Petitioner attempts to answer this evaluation of all the evidence by arguing that the Circuit Court ignored what the "carrier's representatives *said*" and "what they *did*" (Pet. p. 16), and also disregarded the important fact that over a period of 26 years the carrier had stated its reasons for refusing to include any of the 850 employees concerned, thus making any reiteration of its reasons for opposition to the current proposal completely unnecessary (Pet., pp. 18-19). The short answer to these contentions is that the Circuit Court did not, as petitioner asserts, ignore what the carrier's representatives said and did, nor did it disregard or fail to answer the claim that there was no necessity to give reasons which had been "oft repeated".

As to the first contention, the following testimony on cross examination by the Brotherhood's counsel is what petitioner's chief representative in the negotiations stated in his deposition the carrier "said and did" (R. 192-193):

> "Q. Did the Brotherhood representatives ask you to try to come to some agreement with them, one that might not particularly suit them or you but one which would come out of honest and sincere participation by both parties? A. Yes, words to that effect. They made that statement.
>
> "Q. Did you state that there was no hope of the carrier changing their decision? A. I told them that

[3] *Cf. National Labor Relations Board v. American National Insurance Company, supra.*

the proposal before us was unacceptable and they did not offer any proposal which modified or changed it.

"Q. Did you give them any intimation, which would lead them to believe that any changes could be made in the proposal that would be acceptable? A. I told them that the only proposal I had was the one before me.

"Q. And you would not accept that? A. It was not acceptable.

"Q. Did you tell them what was wrong with it? A. Yes, I told them what was wrong with it. *We did not want to bring that group within the scope rule of the agreement.*

"Q. Did you tell them why? A. Yes, they have been told why on numerous occasions.

"Q. Do your notes reflect what you told them as to why the Company would not enter into an agreement with them? A. Not specifically, no sir.

"Q. Did you have a reason? A. Yes, the same reason we have always had.

"Q. What is that? A. *We don't want them tied down by an agreement . . .*". (Italics supplied.)

Obviously, on such evidence[4] the Circuit Court not only considered what the carrier's representative said and did, but was clearly correct in its conclusions, first, that the carrier "was making no effort whatever to bargain" with respect to the 850 employees, "but, on the contrary, was adhering to the position theretofore taken that collective

[4] Clearly, it would be improper in a brief in response to a petition for certiorari to review all of the evidence of which the aforequoted testimony is typical. We think it proper to state, however, that a full review of all the evidence in this case will disclose that there are few, if any, cases in which the record more clearly justifies the ultimate conclusion of the Circuit Court that the carrier did not engage in good faith bargaining.

bargaining was not properly applicable to them;" second, in its conclusion that the carrier did not meet its statutory obligation to bargain in good faith "merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain"; and third, in its conclusion that "collective bargaining means something more than mere talk by those who have decided in advance not to bargain at all . . ." (R. 254).

As to the second contention, the evidence before the Circuit Court disclosed that when the carrier's reasons for rejecting the Brotherhood's proposal were advanced in 1937 and 1943, the Brotherhood was not the certified representative of the excepted clerical employees, and the carrier was thus under no statutory duty to bargain regarding such employees. Consequently, the carrier was at liberty in 1937 and 1943, without violating its statutory duty, to give any reasons it desired for rejection of the Brotherhood's proposal. Once the certification was issued, however, the only valid objections which the carrier could make, and still comply with its statutory obligation to "treat" with the Brotherhood and "exert every reasonable effort to make and maintain agreements",[5] were reasons directed to the substance of the Brotherhood's proposal, asserted in free and full discussions, and justified on reason. That the Circuit Court fully appreciated this is evident from the following statement in Judge Parker's opinion (R. 253-254):

> "It is argued that the negotiations between the brotherhood and the railroad in 1943 and prior thereto showed collective bargaining with respect to the 850

[5] 45 U. S. C. Sections 152 First and Ninth.

> employees here involved; but the trouble is that these negotiations did not evidence bargaining on the part of the railroad with respect to these employees but refusal on its part to include them within the ambit of the bargaining process."

It is nonsense for the petitioner to contend, as it does on page 13 of the petition, that "there is no way in which the District Court could enforce a mandatory injunction 'in accordance with this opinion' [the opinion of the Circuit Court] except by commanding the carrier to make some concession or counter proposal, or else accept the Brotherhood's proposal." The Circuit Court stated in its opinion that "We do not, of course, suggest the terms of any agreement as to any employee or group of employees; for it is not the function of the courts to make agreements for the parties or to force them to accept agreements which they are unwilling to accept" (R. 257). It then expressly and specifically limited the relief available to the Brotherhood to an injunction directing "that the railroad bargain collectively and in good faith with the Brotherhood with respect to the pay, rules, and conditions of employment as required by the terms of the Railway Labor Act" (R. 257). The court stated that that was what it did and all that it did.

The injunction which would issue in this case would be in the general terms prescribed by the Circuit Court, namely, that the carrier would be required to bargain collectively in good faith with the Brotherhood with respect to the pay, rules, and conditions of work of the involved employees.

Certainly it cannot be said that the foregoing action of the Circuit Court so far departs from the accepted and usual course of judicial proceeding as to call for an exercise

of this Court's power of supervision. On the contrary, as we shall now show, the decision of the Circuit Court is entirely in accord with the decisions of this Court with respect to the issuance of mandatory injunctions to compel good faith bargaining under the Railway Labor Act.

III.

The Questions of Federal Law Alleged to be Involved in This Case Have Been Well Settled by This Court.

The petitioner challenges the decision of the Circuit Court on the ground that it does not comply with the provisions of the Norris-LaGuardia Act. It apparently concedes, as indeed it must in view of well-settled principles established by this Court, that the Norris-LaGuardia Act does not deprive federal courts of jurisdiction to compel compliance with positive mandates of the Railway Labor Act such as those involved in this case which require petitioner to bargain in good faith with the duly authorized representative of its employees. *Virginian Railway Co. v. System Federation No. 40, supra; Graham v. Brotherhood of L. F. & E.*, 338 U. S. 232.

Petitioner contends, however, that the court was required by the Norris-LaGuardia Act to point out "what additional acts should be performed by the carrier to fulfill the requirements of collective bargaining." The fallacy of this argument is that it conflicts with well-established principles long recognized by this Court. In the *Virginian* case for example, the findings of the District Court with respect to the mandatory injunction there involved were couched in almost the same terms as those of the Circuit Court in this case. The District Court, in the *Virginian* case, held that the complainants were entitled to an injunction "requiring the railway to recognize and treat with

the complainant System Federation No. 40 as the representatives of the five crafts in matters pertaining to rates of pay, hours of employment, and working conditions." *System Federation No. 40, etc. v. Virginian Railway Co.*, 11 Fed. Supp. 621, 623, aff'd. 300 U. S. 515. Thus, in the *Virginian* case as here, the court did not point out what specific acts the carrier should perform in order to comply with its statutory duty but in general terms held that it should recognize and treat with the representatives of its employees with respect to rates of pay, hours of employment, and working conditions. Furthermore, it is well settled that an injunction which in general terms commands exact compliance with a statute requiring good faith bargaining is a proper exercise of the court's injunctive power. *National Labor Relations Board v. Express Publishing Co.*, 312 U. S. 426, 432.

From the foregoing it is clear that the type of injunction prescribed by the decision of the Circuit Court is not prohibited by the Norris-LaGuardia Act.

Petitioner also argues that the opinion of the Circuit Court would require the District Court to "assume the functions of a compulsory arbitrator of a labor dispute which was never contemplated by the Railway Labor Act and would be in direct conflict with its purposes as repeatedly defined by the Supreme Court" (Pet., p. 8). This conclusion is predicated upon the same erroneous interpretation of the decision of the Circuit Court as that advanced to support its request for the exercise of this Court's power of supervision, i.e., that the decision requires petitioner to make counter proposals or concessions. We have pointed out above that the Circuit Court made no such finding, nor is its decision susceptible of any such interpretation.

It is clear, therefore, that petitioner's argument that the Circuit Court's decision presents important questions involving the interpretation of the Railway Labor Act is without foundation.

Petitioner also appears to argue that the decision of the Circuit Court prevents petitioner from making such individual contracts as it might elect to make with individual employees. In support of its contention it cites *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342; and the *Virginian* case, *supra*. Whatever the law may be with respect to the making of such individual contracts, *it is not reached in this case.* It is clear that petitioner is required by law to bargain in good faith, and that individual contracts may not be used to defeat or delay the *procedures* prescribed by the Act or to forestall collective bargaining. *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332, 337. The question of the *right* to contract individually with respect to employees in a bargaining unit can become an issue only after good faith bargaining *has started.* That is not the case here. The Circuit Court did not hold, as contended by the petitioner, that "there is a refusal to bargain in good faith because the carrier in the present case insisted that some of the clerical employees should not be included within the general trade agreement" (Pet., pp. 22-23). What the court did hold was that "the duty is not satisfied when a large group of employees embraced within a bargaining unit is excluded from the *benefits of the bargaining process*" (R. 253, Italics supplied). This finding obviously does not involve any question of the validity of individual contracts and stands for no more than the proposition that the carrier must bargain in good faith with respect to the conditions of employment of all members

of the bargaining unit, whatever the outcome of that bargaining process may be with respect to leaving certain subject matter open to individual bargaining.

Petitioner cites the case of *Steele v. Louisville & Nashville R. R. Co.*, 321 U. S. 192, in support of the proposition that the collective bargaining representative has the duty to exercise the power conferred upon it in behalf of all those for whom it acts without hostile discrimination. This is exactly what the Brotherhood tried to do, without success, in this case. If petitioner is charging the Brotherhood with hostile discrimination, it is the first we have heard of any such claim, either by evidence or by argument. The fact is that there is no evidence in this case of any attempt on the part of the Brotherhood to do other than act in behalf of *all* those whom it represents under the certification of the National Mediation Board without hostile discrimination. Furthermore, the Circuit Court correctly stated our position when it said: "We do not mean to say that all members of the bargaining unit should be subjected to the same rules, and we do not understand that the Brotherhood has ever so contended" (R. 253).

Finally, petitioner cites *Brotherhood of Railroad Trainmen et al. v. Toledo, P. & W. R. R.*, 321 U. S. 50, in support of the contention that the Brotherhood has failed to make every reasonable effort to settle this dispute, and under the Norris-LaGuardia Act is therefore not entitled to an injunction. That case supports rather than detracts from the Brotherhood's position. There this Court held that the involved labor organization was not entitled to injunctive relief until it had utilized the administrative remedies available under the Railway Labor Act, including voluntary arbitration. The Brotherhood in the instant case, as we pointed out above in our Statement of the case, utilized

all of the administrative procedures of the Act. It attempted to bargain with petitioner; it invoked mediation under the auspices of the National Mediation Board; and finally it accepted the Board's proffer of arbitration, which petitioner declined. This case then became one where injunctive relief or economic strength were the only remaining remedies.

The inescapable conclusion from the foregoing discussion is that there are no important and unresolved federal questions involved in this case, and that the only legal questions described in the petition either are not reached in this case or are well settled by decisions of this Court.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 741

ATLANTIC COAST LINE RAILROAD COMPANY, *Petitioner,*

v.

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, and L. L. WOOTEN, E. C. BRYAN, B. B. PHILLIPS, JR., T. C. MATHIS, P. C. SARRETT and H. W. HAWKINS, in behalf of themselves and certain other persons similarly situated, members of Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and members of the craft or class of clerical, office, station and storehouse employees of Atlantic Coast Line Railroad, *Respondents.*

PETITIONER'S MEMORANDUM REPLY TO BRIEF FOR RESPONDENTS

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PETITIONER'S MEMORANDUM REPLY TO BRIEF FOR RESPONDENTS

The brief for respondents is a clever effort to represent that the issues raised by the petition are wholly issues of fact. On the contrary—*there are no issues of fact* raised by the petitioner. There is no disagreement between petitioner and respondents as to the facts regarding negotiations between the representatives of the railroad and of

the employees. The Circuit Court was not called upon to decide any issue of fact.

The Circuit Court decided *as a matter of law* that the conduct of the negotiations by the railroad representatives (as to the facts of which there was no dispute) did not constitute "collective bargaining in good faith." Accordingly, the Circuit Court decided that the District Court—*upon the undisputed facts*—should have granted a mandatory injunction requiring the railroad (the present petitioner) to conduct further negotiations in a manner which the Court would approve.

The petitioner contends that the law laid down in the opinion of the Circuit Court to support a mandatory injunction is not only in conflict with the law as expounded in other circuits and in the Supreme Court, but is in conflict with what the Circuit Court itself concedes to be the law, which is that "it is not the function of the courts to make agreements for the parties or to force them to accept agreements which they are unwilling to accept."

Nevertheless, *on the undisputed facts as found by the District Court,* which were not controverted by the Circuit Court, the only possible purpose of issuing a mandatory injunction in this case must be to bring pressure upon the railroad to make (in whole or in part) an agreement which it is unwilling to make. Representatives of the railroad have heretofore, *on the undisputed facts,* received the proposed agreement and discussed it at length in several conferences with representatives of the employees, whom the railroad recognized and "treated with" as authorized representatives of the employees. After these discussions and due consideration, the representatives of the railroad declined to agree to the proposed changes in the current agreement. What more should the representatives of the railroad do? What more can they be compelled by mandatory injunction to do, in order to "bargain in good faith?"

We seek a review by the Supreme Court of two pure issues of law: First, on the undisputed facts, was the Dis-

trict Court right in holding, as a matter of law, that the railroad representatives *had* "bargained in good faith," or was the Circuit Court right in holding, *on the same facts,* that the carrier's conduct did *not* constitute "bargaining in good faith?" Second, was the District Court right, as a matter of law, in refusing, or was the Circuit Court right, as a matter of law, in *ordering,* a mandatory injunction to compel the railroad representatives to conduct further negotiations under the compulsion and supervision of the District Court?

As pointed out in our petition, previous judicial interpretations of the requirements of the Railway Labor Act have established *as a rule of law* that a mandatory injunction can be and should be issued to compel a railroad to "treat with" the duly authorized representatives of its employees—that is to recognize the authenticity of their representation and to discuss freely their proposals. There is *no* decision of this Court interpreting the Railway Labor Act to authorize the issuance of a mandatory injunction to provide for a supervision and direction of such negotiations by the District Court.

We submit that the petition presents "an important question of federal law which has not been, but should be settled by this court" and also that the Circuit Court "has decided a federal question in a way probably in conflict with applicable decisions of this court."

This court granted certiorari for the settlement of questions of similar importance in *Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 346, stating:

> "These questions are unsettled ones important to the administration of the current Railway Labor Act, and we granted certiorari."

For these reasons we submit that the petition should be granted.

Respectfully submitted,

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